

**California Department of Transportation  
Native American Advisory Committee  
Quarterly Meeting Minutes  
October 5, 2005**

Chairman Joseph Myers called the meeting to order at 9:10 am.

**Adopt Agenda:** Chairman Myers asked if there were any revisions or additions to the agenda. There were no changes and the agenda was adopted.

**Approve Minutes:** Chairman Myers requested that the NAAC make a motion to approve the minutes for the July 13, 2005 meeting. A motion was made by Richard Myers; seconded by Benjamin Charley, the motion was passed by a vote of 10 Yes, 0 Against.

**Roll Call:** NAAC Committee members in attendance were: Samuel Elizondo, LeLand Watterson alternate for Bruce Klein, Joe Loya, Chris Walters alternate for Chairman Deron Marquez, Joseph Myers, Richard Myers, Dave Nenna, Benjamin Charley alternate for Lorenda Sanchez, Greg Nesty alternate for Garth Sundberg, and Kathy Wallace.

Director's Representatives in attendance were: Brian J. Smith, Deputy Director, Planning and Modal Programs; Joan Sollenberger, Division Chief, Division of Transportation Planning; Sharon Scherzinger, Office Chief, Office of Regional and Interagency Planning; Cynthia Gomez, Branch Chief, Native American Liaison Branch.

**Others in attendance:** Maria Rodriguez, Caltrans District 10; Sandra Lowry, Yurok Tribe; Dion Wood, Karuk Tribe; Bo Mazzetti, Reservation Transportation Authority; Dave Moore, Caltrans District 2; Lee V. Bigwater, CA/NV Tribal Technical Assistance Program (TTAP); Stacy Dixon, Susanville Indian Rancheria; Julianne Baltar, Alaska Tribal Transportation Workgroup; Tina Biorn, Caltrans Environmental; Greg King, Caltrans Environmental; Karen Nissen, Caltrans District 6; Robert Padilla, Caltrans Civil Rights; Mona Arteaga, Department of Toxic Substance Control (DTSC); Jim Marxen, DTSC; John Sharp, Caltrans Environmental; Blesilda Gebreyesus, Caltrans District 4; Valarie Smith, Caltrans Native American Liaison; Jila Priebe, Caltrans Native American Liaison; Bruce Behrens, Chief Counsel, Caltrans Legal Division; Maxine Ferguson, Assistant Chief Counsel, Caltrans Legal Division; David McCray, Caltrans Legal Division.

**OLD BUSINESS**

**Highway Landscaping Subcommittee Report:** Member Wallace announced that the Subcommittee wishes to finalize the landscaping guide. There is a meeting scheduled for October 19, 2005, at the Elk Grove Maintenance Center at 1 pm in Elk Grove, California.

**Legislative Subcommittee Report:** Member Loya mentioned that he had nothing new to report. Cynthia Gomez pointed out in the Committee's packet included information regarding new and upcoming legislative information.

**Environmental Report:** Tina Biorn gave an overview of the organizational flow chart for the Division of Environmental Analysis. She stated that she would report on environmental issues as requested from the Committee, as well as provide additional written materials as needed.

**Nominations 2006-2007 term:** Valarie Smith announced to the Committee they would be voting for new members for the 2006-2007 terms. The terms will be effective January 1, 2006 until December 31, 2007.

## **NEW BUSINESS**

**Farewell Message to the Committee:** Brian Smith announced his retirement from state service. He thanked the Committee members and Caltrans staff for everyone's hard work. He also mentioned that he was very fortunate to be involved with such a great group of individuals and this experience has been a learning one and he believes that this Committee has done great things and will continue to do great things.

**Report on the meeting with Will Kempton, Director:** Chairman Myers reported on his meeting with the Director. He mentioned that the Director is very supportive of the Committee's past and future efforts. Chairman Myers also stated that the Director was well informed and in support of the Department's Policy, "Working with Native American Communities"; the Director even suggested that the policy can be strengthened in some areas, and wanted to get input from the Committee as how the Department's policy can be improved. In addition, the Director promised to visit the NAAC meetings on occasions. Overall the meeting was very successful.

**Discussion on the Department Director's Policy 19:** Bo Mazzetti asked the Committee to take a look at the policy and make recommendations on how the policy can be improved. Chairman Myers stated that comments and input should be sent to Cynthia Gomez or Jila Priebe by November 15, 2005. There was a discussion regarding the formation of a Subcommittee to discuss the recommendations and changes of the policy; the Committee will discuss this option in their January meeting. Further information would be forthcoming after comments are received.

**Final Rule Video:** The Committee watched the "Final Rule" video; Chairman Myers stated that the video was produced to help clarify, and point out the changes and revisions of the new federal Transportation Act, and the Bureau of Indian Affairs (BIA) policies and mandates in regard to the Indian Reservation Roads Program (IRR). The video was produced in cooperation with Mr. Leroy Gishi, Division Chief of Transportation Planning, (BIA.)

## **Concerns with the policy regarding the BIA Indian Reservation Roads (IRR)**

**Inventory:** Julianne Baltar gave a presentation on the final rule. She explained how some of the changes in the BIA policies and mandates differ significantly from previous policies and regulations. When gathering data for the road inventory, tribes need to be

aware of certain areas that may be more beneficial to them. In addition, Ms. Baltar announced that she was providing a two-day workshop for tribes over the next two days giving more information on the IRR program.

**IRR Program Coordinating Committee:** Bo Mazzetti announced his appointment to serve as a member of the “IRR Program Coordinating Committee.” He and approximately 45 others were nominated from tribes throughout the nation, and the Secretary of Interior appointed 12 tribal regional representatives to the IRR Program Coordinating Committee. The Coordinating Committee was established to provide input and recommendations to the BIA and Federal Highway Administration (FHWA) in developing IRR program policies and procedures. Ms. Peggy O’Neil is the alternate; she is a representative from the Yurok Tribe of northern California. He also mentioned that he would give the NAAC a progress report on the Coordinating Committee as the committee moves forward.

**Legislative Proposal: Contracting with Tribal Governments:** Cynthia announced to the Committee that we will have this report at the next NAAC meeting.

**Transportation Research Board (TRB) Conference:** Cynthia informed the Committee that she attended the TRB conference in Santa Fe, New Mexico. She stated that the overall topic of discussion was streamlining environmental processes for projects. She also mentioned that there were discussions about having more Tribal research topics and making sure consultation is done early on to be more effective.

**TERO Policy:** Sandra Lowry asked the Committee for clarification on Caltrans’ TERO policy. She mentioned that she and other tribes are confused and want clarification on why Caltrans’ TERO policy was withdrawn without any notice to tribes. Furthermore, it has been hard getting support from the District Liaison because she covers two other Districts. Although, Charlie Fielder, the District Director has been supportive, many tribes in that region feel their issues are not being heard and attended to by the District Liaison, she suggested that maybe tribes can get equal help by having more Liaisons for each District.

Bruce Behrens, Chief Legal Counsel stated that the new Director would like Caltrans to be more efficient and run more like a business, with that in mind, he is promoting partnership and participation with stakeholders. He explained that it is his job is to advise his clients (Department) with the best legal advice and analysis; therefore, the TERO policy was withdrawn because of recent 9<sup>th</sup> Circuit Court of Appeals decisions, which set new standards for interpreting the TERO compliance requirements for state and local governments. Because of the findings by the courts, and a challenge by the contractor on a District 1 project on and near the Smith River Rancheria, the Smith River tribe’s application of its TERO ordinance on the Caltrans project and the Department’s TERO policy was revisited. Mr. Behrens then stated that originally his office was asked to clarify whether TERO applies on state funded projects. He asked his staff to research the legality of the policy. Chairman Myers stated his concern that the decision to withdraw the policy was premature, and should have been done in consultation with the Tribes.

Mr. Behrens indicated that he had hoped to get ideas on how to consult with Tribes on this issue; however, Chairman Myers was troubled that action had already been taken when the consultation should have occurred before the Department took action. Mr. Behrens introduced Ms. Maxine (Mickey) Ferguson, to give an overview of the legal findings to clarify the Department's findings.

Ms. Ferguson referred to an "Indian Transportation Law on Reservation Roads" draft report that she had reviewed for Vivian Philburn, FHWA Legal Counsel, which was primarily written by Richard Jones, Ex-Regional Chief Counsel. She recommended the report because it was an excellent resource, and it was a reference source for the Legal staff that did the research on the TERO issues (at the time of the meeting, the report was not available to the general public). She explained that Proposition 209, which was passed in 1996, does not allow preferences of any kind, except when federal funds are in jeopardy. FHWA will not withhold funding if the State does not comply with TERO. In a recent 9<sup>th</sup> Circuit Court of Appeals decision, Malabed v. North Slope Borough, an Alaska case, the Court held that TERO's are a racial preference, and the State nondiscriminatory laws are not in conflict with the TERO federal policy, because TERO is not statutorily mandated—giving states the discretion whether they can or will conform to TERO. In another case, Montana v. King, the Court ruled that alienated lands, such as state right of ways—even on Tribal lands, were outside the jurisdiction of tribes, therefore, TERO would not apply to Caltrans projects.

Ms. Lowry was concerned that the Department may be interpreting a political preference for hiring Indian people as a racial preference, which was a distinction in the *Mancari* case (Morton v. Mancari), where the Court acknowledged that Tribal governments had the authority to enact Indian preference ordinances.

Mrs. Julianne Baltar, consultant for Alaska tribes, cautioned using the *Borough's* case because tribes in Alaska do not own land, which was a major consideration in that case.

Mr. Mazzetti was concerned that the interpretations of these cases are being used to "gut" TERO. He also wanted to know how many Caltrans projects are truly "100% state funded," it has been his experience that most projects have some federal funds attached to them. Ms. Sollenberger explained that there were not many projects that were completely state funded.

Mr. Richard Myers voiced his concerns for his Tribe. He stated that his Tribe has spent a considerable amount of money and resources through the Tribal TERO program to train over forty people to work on Caltrans' projects in his area. It is going to be difficult to take this information back to his Tribe and explain that Caltrans no longer honors their TERO policy, and the Tribe's limited resources were all spent for nothing.

Mr. Mazzetti asked Mr. Behrens if he or his office directed the Civil Rights Office to retract the TERO policy. Mr. Behrens replied "no."

Chairman Myers expressed his opinion that Caltrans staff should take the time to know the history regarding California Indian people and Tribal governments, and become more familiar with the issues and subject matter before taking such drastic steps to remove policies that affect Native people.

Chairman Myers stated that pulling the policy, which impacts tribes, without appropriate consultation with tribes is a violation of the Department's Policy #19. Chairman Myers asked Mr. Robert Padilla of Civil Rights, under whose direction, and why was the TERO policy withdrawn. Mr. Padilla replied the policy was withdrawn under the direction of the Civil Rights Deputy Director, Olivia Fonseca and the findings from the Department's Legal Division. He stated that now he realizes the policy should not have been retracted without notification, and for that he apologizes.

There were so many questions and concerns regarding the withdrawal of the policy without consulting with the tribes, that Ms. Ferguson did not finish explaining the legal findings.

The Committee directed the Native American Liaison Branch to set up a meeting to proceed with a review of the legal findings, and to follow up on the issue. Chairman Myers mentioned that it is important to involve and consult with tribes when revising any policy that impacts tribes. TERO is very serious sovereignty issue therefore, he asked the Committee members for volunteers to form a subcommittee to work on the issue. Ms. Gomez stated that her office would be glad to work on this issue, but because of the internal structure of the Department, the NALB's involvement may be limited---but her office will do all that it can do to help resolve the issues and report back to the NAAC. Volunteers to form the subcommittee included Joe Loya, Sandra Lowry, Bo Mazzetti, Deon Wood, and Joseph Myers.

**Announcements:**

The next NAAC meeting is scheduled for January 11, 2006, at Woodland Training Center. 9:00 AM to 3:00 PM.

**Adjournment**

Meeting adjourned at 3:25pm.